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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL REBECCA BECHTEL,

Defendant and Appellant.

C039338

(Super. Ct. No. TF030289A)

A jury convicted defendant Angel Bechtel of voluntary manslaughter of her former boyfriend Marcos Madrigal (Pen. Code, § 192, subd. (a)), and the court sentenced her to 11 years in state prison. Defendant argues: (a) the prosecutor engaged in misconduct in connection with the admission of an audiotape into evidence; (b) the trial court erroneously admitted this audiotape; (c) her attorney rendered ineffective assistance of counsel in failing to review the audiotape before it was presented to the jury; (d) the trial court erred by failing to instruct the jury one of the witnesses was an accomplice as a matter of law; and (e) the trial court erred in sentencing defendant to the upper term. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A

Basic Facts

Marcos Madrigal was killed the night of July 24, 2000, outside a market. The People charged defendant with second degree murder and alleged an enhancement for the use of a deadly or dangerous weapon. (Pen. Code, §§ 187, 12022, subd. (b).)

The night of the killing, Samuel Nieto heard noises and went outside to investigate. He saw four people: his daughter, Ruby Nieto; his grandson, Jason Bechtel; a second man, Salvador Loy (also known as Chava); and the soon-to-be-victim of the killing, Marcos.¹ Jason is defendant's brother. Chava was defendant's boyfriend at the time. Marcos was defendant's former boyfriend.

The first time he came out to investigate, Samuel saw Ruby, Jason, and Marcos yelling at Chava. He told the four to knock it off and went back into the house for about 10 minutes. When he heard more noises outside, Samuel came back out. This time he saw Marcos on the ground and saw Jason shaking Marcos telling Marcos not to die. Samuel called 911.

The same night, a neighbor, Cynthia Williams, heard a woman yell, "You fucking asshole. I'm gonna call the cops." Next the

¹ We shall refer to each of the participants and witnesses by their first names for simplicity and clarity, not out of disrespect.

woman said, "My God. My God. My God. How could you have done that? Java, Java, Java, how could you do that? "

Tracy Police Officer Bernie Cummins arrived on the scene at about 1:30 a.m. When he arrived, Marcos was lying on the ground and Ruby Nieto was standing over him. Ruby was crying hysterically. Officer Cummins could not find Marcos's pulse.

The next day, the police recovered a kitchen knife in a nearby orchard stuck in the mud. The knife had no blood on it. The knife was between seven and three-quarters inches and eight inches long from the tip of the blade to the hilt.

Dr. Robert Lawrence testified Marcos died as a result of a single stab wound to the left side of his torso. The wound was eight and one-half inches deep. Dr. Lawrence testified the knife found in the orchard was consistent with the wound to the victim. Dr. Lawrence could not exclude the orchard knife as the murder weapon even though the knife blade was shorter than the depth of the wound and there were no hilt marks in the victim's side.

Chava's brother testified Chava and defendant showed up at his home at about 5:00 a.m. after the killing. Later that night when a news story came on television accusing Chava of the crime, Chava turned to defendant and said, "[N]ot me. Your mom knows that I did not do that." Defendant turned to him and said, "I know Chava, I know Chava." Chava testified his brother told him Jason probably killed Marcos.

Terry Nieto is Ruby's son and defendant's sister. A few days after the homicide, Terry took Ruby to pick up defendant

and bring her back to Stockton. During the drive back to Stockton, defendant told Ruby she was sorry it happened. During an audiotaped interview, Terry told officers he heard defendant stabbed Marcos.²

In a videotaped police interview a few days after the homicide, Ruby told San Joaquin Sheriff's Deputy Wuest that defendant told Ruby she did not mean to do it; defendant just wanted to scare Marcos so he would go away and go home. Ruby said defendant said the homicide was an accident. When defendant discovered she had killed Marcos, defendant told Ruby she did not know what to do.

The jury found defendant not guilty of murder, but guilty of the lesser included offense of voluntary manslaughter. (Pen. Code, § 192, subd. (a).) The jury also found the weapon enhancement true. The trial court sentenced defendant to the upper term of 11 years.

B

The "Eyewitnesses"

Jason, Ruby, and Chava gave differing accounts of the events of that night, although none of them directly testified as to who stabbed Marcos. Much of their direct testimony contradicted what the law enforcement officers testified the witnesses reported to them the night of the homicide and shortly thereafter.

² We shall discuss this evidence in detail in our discussion section.

1. *Chava's Testimony*

We start with Chava's testimony. The day of the homicide, defendant told Chava she was going to a birthday party with her former boyfriend Marcos. Chava saw Marcos and defendant as they returned from the party. Then Chava and defendant met at the local market and started to walk to defendant's home. Marcos drove by the two of them, put his car in reverse, and backed up to them. At that point, Marcos and Jason got out of the car. Marcos seemed angry and wanted to talk to Chava about defendant. Marcos and Chava argued about making defendant choose between them.

A short time later, for reasons that are unclear, Chava got into a fight with Jason. Marcos grabbed Jason to keep Chava and Jason from fighting. After the fight was over, Jason and Marcos walked back toward Jason's home. Chava went back to the store. Later, Chava crossed the street and stood by a cement pipe. Chava did not see anyone stab Marcos and testified he did not do it.

Next, Chava testified defendant crossed the street to see him. Chava could not remember if defendant had a knife in her hand when she approached him and Chava denied telling the police she did. The two left the area through an orchard. Chava denied telling the police defendant had plunged the knife in the ground in the orchard. Chava also denied taking the police to the orchard to show where defendant buried the knife.

San Joaquin Sheriff's Deputy Joseph Herrera contradicted several key points of Chava's testimony. Deputy Herrera

interviewed Chava when he was arrested about a week after the homicide. Chava told Deputy Herrera he had asked Marcos for a ride after his fight with Jason. Marcos agreed to give him a ride. Marcos told Chava to wait by the cement pipe while Marcos returned to defendant's home for a moment. Chava lost sight of Marcos but heard Marcos and defendant arguing loudly. Deputy Herrera testified Chava told him defendant came into Chava's view with a kitchen knife in her hand and then disappeared from his view again.

Deputy Herrera reported Chava told him when defendant approached him, she said she had done "something bad." Chava further told the deputy defendant buried the knife in the mud in the orchard. Chava took the police out to the orchard in an attempt to locate the knife, but it was dark and they did not locate the knife. Deputy Herrera reported Chava admitted defendant told Chava she had stabbed Marcos.

2. Jason's Testimony

Jason also testified about the events of that fateful night. Marcos came over to his house late that night. Eventually, Marcos started speaking with defendant on her front porch. During that conversation, defendant got upset with Marcos and told him to go home. Jason and Marcos got into Marcos's car and talked for a few more minutes. Jason then asked Marcos to drive him down the street.

The two drove down to the neighborhood market where they saw defendant and Chava walking down the street. Marcos got out

of the car and approached defendant and Chava. Chava and Marcos started to argue. Defendant got upset.

Jason testified defendant walked over to Marcos and Chava but Jason stopped her from approaching them. At some point during this event, Jason got into a struggle with Chava.

Jason went into his house to get his mother. When Jason and his mother came back outside, Marcos and Chava were still arguing loudly. Jason's mom started yelling at the two, telling Chava to leave.

At some point in time, Jason noticed Marcos had been injured. Marcos started to moan and was hunched over and holding his side. Jason had no idea Marcos was hurt prior to that. Next, according to Jason, Marcos walked toward his car and then fell. Jason went over to Marcos and saw Marcos had blood all over his shirt. Jason started to scream and yell. Defendant came over to Marcos. She started to scream when she got there.

During the arguments, Jason never saw anyone swing at anyone else. He never saw anyone with a knife. Jason never saw anyone stab Marcos. Jason told Deputy Randy Revillar that he had not seen anything, did not hear anything, and did not know anything about the homicide.

However, Jason told Deputy Wayne Orvick that he first became aware of the victim when he looked out of the front window of his home. Shortly after the killing, Jason also told the police the knife they recovered in the orchard looked like one that was kept in the dish drainer in the kitchen of his

home. At trial, however, Jason testified the knife was similar to one at his home, but did not know if the knife in evidence came from his home.

3. *Ruby's Testimony*

Ruby Nieto also testified about the events of the evening. She drank a couple 40-ounce beers that night. She was watching television when she heard voices arguing outside. She went outside to investigate and saw Marcos, Jason, defendant, and Chava. Marcos and Chava were arguing with each other. Jason got between Marcos and Chava and tried to keep them apart. Ruby pulled Jason out of the fight. Ruby repeatedly told the other two men to leave. Marcos and Chava continued to argue. Ruby got tired of yelling and went back into the house to watch more television.

After a while, Ruby went back outside and the three men were still arguing. Ruby pulled Jason out of the fight again. Defendant was yelling at the men as well.

Ruby moved Marcos's car from where it was parked to her driveway. Jason, Marcos, Chava, and defendant were all still in the street arguing. Next, Ruby moved Marcos's car to the market. She told everyone to quit arguing and told Marcos to go home. Despite her pleas, the men continued to argue. Ruby then went back into her home.

The next time Ruby came outside, she heard defendant and Jason screaming. Defendant was screaming "Chava, Chava, Chava, what did you do?" Jason was on the ground next to Marcos. Marcos had been stabbed. Defendant was running around. Ruby

did not see Chava. Ruby ran back into the house and also called 911.

Defendant did not testify.

DISCUSSION

A

Audiotape Evidence

In a three-pronged attack, defendant argues an audiotape of an interview between Ruby's son, Terry Nieto, and the police should have been excluded from evidence. On that tape, Terry states he heard defendant took a knife from her kitchen and stabbed Marcos when he came at her. First, defendant asserts the statements contained on the tape are inadmissible because they are not based on Terry's personal knowledge and the People failed to establish the identity of the hearsay declarant. Second, defendant claims her attorney's failure to review the tape (and obtain some type of redaction or pretrial ruling about its admissibility) prior to its being played for the jury constituted ineffective assistance of counsel. Third, defendant claims the prosecution engaged in misconduct by failing to turn over the tape in a timely fashion, misrepresenting its contents and arguing about the evidence to the jury. Defendant argues the trial court erred in refusing to grant defendant a mistrial based on this misconduct. We reject each of these arguments.

1. Admissibility and Ineffective Assistance of Counsel

Defendant's claims of inadmissibility and her attorney's ineffectiveness are inextricably intertwined. Because we conclude the trial court did not abuse its discretion in

admitting the tape with the appropriate jury instructions, defendant suffered no prejudice by her attorney's failure to review the tape prior to its admission.

a. *Background Facts*

At trial, Terry Nieto testified he drove his mother, Ruby, and defendant back to Stockton. During the drive, Terry heard defendant say she was sorry. Terry claimed he did not hear any of the rest of the conversation between defendant and Ruby. Terry could not remember if he told the police his mother had said defendant took a knife out of the strainer next to the sink and stabbed Marcos when he started to come toward defendant. Terry testified his mother did not tell him that had happened. Terry testified he did not hear defendant say she stabbed Marcos or anything that could be construed that way. Terry further testified he was aware, from the conversation in the car, defendant knew she was in the middle of the argument between Marcos and Chava.

In rebuttal to his testimony, the People played an audiotape of an interview between Terry and the police. During the interview, Terry and the police officer engaged in the following conversation:³

³ The clerk's transcript contains a purported transcript of this interview prepared by defense counsel, which contains many inaccuracies. We have independently reviewed the tape and transcript and the following relevant excerpts are what the tape actually says.

"Terry: So I went over there to the house, and we picked 'em up. [Defendant] just came outside, jumped in the car, and we left. When she gets in the car, just emotions, you know, just started goin', and um, she was crying. My mom [Ruby] was crying. I'm driving, and I'm crying. And I'm hurt, and I'm wondering what's going on. Um. I don't remember the exact conversation, like I said, my emotions were going too. And um, I don't think my sister could do something like this. And um. She's, um, [telling] my mom that she's sorry. She's real sorry and, then um. I don't know what she -- what really she said, but I remember her saying that she was really sorry and she didn't mean for this to happen. Now, I don't know what that means in her words or in her eyes.

"Detective: Uh hum.

"Terry: But basically that was the extent and she was wondering what was gonna happen. I said, I don't know, but the police want to talk to you. They just want to talk to you. And she goes well I'm scared Terry, what if they arrest me? I said, well, you still gotta go talk to 'em. So then, when we got back into Tracy, she goes, well let me kick back for a day. . . .

"[¶] . . . [¶]

"Detective: Um, have you, have you since ever heard why this happened? Was it just an incident where things just got carried away or have you ever heard a story about what took place?

"Terry: I don't know. The story, the stories vary from different people. When, uh, the story -- the story that I heard

is -- is that, uh, I guess they went out to a party early in the day, and uh, that they was, they was drinking. All of them -- all of them were drinking. And that some time in that night they went back to my grandfather's house in Carbona. I guess in the lot, or at the store, I'm not sure where, and they were out and her old man, Chava, he was there and he come, I guess he came out or he was on the road or something. And Marc seen him. And they stopped. I don't know if they had words or not. And [defendant] was telling [Marcos] to get -- get out of there. I don't know if she was cussing at him or not, I don't know what was going on because I wasn't there. Um, anyhow, I guess he didn't want a leave, and, from what my mom and them tell me she went into the house to go call the police and tell them to come out there and get this guy off the property because he's out there causing a nuisance, being loud and noisy. I don't know if he was trying to get at Chava or not, but I know when [defendant], she got off the phone, there's a sink right there by the phone.

"Detective: Uh hum.

"Terry: By the colander, and there's usually knives in the drain with spoons and forks and what not and I guess she just went out there and was telling, Leave, [Marcos], leave, [Marcos]. And then I guess he must've advanced on her. And then she stabbed him.

"Detective: Okay. Did she ever tell you that she felt afraid of Marc on that night? Did you ever hear her say that to

you or, or any of that part of the story that she was afraid he was going to do something to her?

"Terry: I never, I never talked to her about what happened that night. Um, but when I, I, came to visit her one time. No, I didn't. No, I didn't. I came to visit her, but we nev -- hardly never talked about that. I was talking about her defense. . . .

"[¶] . . . [¶]

"Detective: Okay. Alright. Back to the trip from Fresno, so basically, it was just a real emotional thing everybody was kinda crying in the car. And she said she was sorry. She didn't mean for it to happen, but really that was basically the gist of the conversation?

"Terry: Yeah, most of the time, she was talking to my mom.

"Detective: Uh, huh.

"Terry: I, I, I don't want to hear stuff like that. It just breaks my heart to hear stuff like that. I wasn't paying attention really, I just [unintelligible]

"[¶] . . . [¶]

"Detective: [O]kay. Alright. When you guys came home from Fresno, was, did you drive?

"Terry: Yes, I drove.

"Detective: And your mom?

"Terry: She was on the front passenger.

"Detective: And then your sister, anybody else in the car?

"Terry: No

"Detective: Just the three of you? Okay."

b. Discussion

Defendant argues Terry's tape was inadmissible because: (a) Terry lacked personal knowledge of the events of the homicide; (b) the sources of his obvious hearsay information were not identified; and (c) his guesses were inadmissible speculation. Defendant waived this claim by failing to timely object to the admission of this evidence at trial. (Evid. Code, § 353; *People v. Martinez* (2001) 88 Cal.App.4th 465, 486.) We, however, address the admissibility of this tape on the merits because of defendant's claim of ineffective assistance of counsel and her prosecutorial misconduct claim.

"As we have stated in many criminal cases, 'a defendant claiming ineffective assistance of counsel under the federal or state Constitution must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome.' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 274.) To prevail on a claim of ineffective assistance of counsel, defendant must establish prejudice -- that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*People v. Williams* (1997) 16 Cal.4th 153, 215.) Assuming, for argument's sake, defendant's counsel performed deficiently by not reviewing the tape, we nonetheless conclude defendant's counsel's failure to review it prior to its admission did not prejudice defendant because it was admissible.

As conceded by defendant, the admissibility of this tape rests on the requirements of Evidence Code sections 400 through 405.

"Sections 400 through 405 of the Evidence Code define the terms and set forth the procedures to be utilized where the admissibility of evidence is dependent upon the existence of a preliminary fact." (*People v. Herrera* (2000) 83 Cal.App.4th 46, 60.) "As used in these sections, a "preliminary fact" means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence." (Evid. Code, § 400.)" (*Ibid.*)

Evidence Code section 402 provides: "(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article. [¶] . . . [¶] (c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute."

Under Evidence Code section 403, subdivision (a), "[t]he proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] (1) The relevance of the proffered evidence depends on the existence of the preliminary fact; [or] [¶] (2) The preliminary fact is the

personal knowledge of a witness concerning the subject matter of his testimony."

"[T]he correct standard of proof for a preliminary fact under Evidence Code section 403 is evidence sufficient to support a finding by a preponderance of the evidence. [Citations.] In other words that there be sufficient evidence to enable a reasonable jury to conclude that it is more probable that the fact exists than that it does not." (*People v. Herrera, supra*, 83 Cal.App.4th at p. 61.) "'The court should exclude the proffered evidence only if the "showing of preliminary facts is too weak to support a favorable determination by the jury".'" [Citations.] 'The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion.' [Citation.]" (*Id.* at p. 62.) Thus, the *Herrera* court concluded the People must have proven the preliminary fact by a preponderance to allow the admission of a coconspirator's hearsay statement. (*Id.* at p. 63.)

Here, the preliminary fact defendant contends was missing to allow the admission of Terry's hearsay statements was that either Ruby or defendant provided Terry with this information. We conclude the trial court did not abuse its discretion in concluding there was a sufficient basis from which a jury could determine Terry received this information from Ruby or defendant, rather than from some other person.

Terry's tape-recorded statement contains two or three layers of hearsay, depending on whether the source of the

information is Ruby (two layers) or defendant (three layers). The first layer of hearsay is Terry's out-of-court statement on the tape. Defendant does not argue there is any problem with this layer. Instead, she focuses on the second and third layers. These layers are the out-of-court statements that are the sources of Terry's information on the tape; either directly from Ruby or defendant (one layer), or from defendant through Ruby (two layers).⁴

There was sufficient evidence from which a jury could reasonably conclude Ruby or defendant provided this information to Terry. It is undisputed Terry was in the car with Ruby, his mother, and defendant, his sister, on the drive back to Stockton. Terry admitted to hearing defendant say she was sorry. From that conversation in the car, Terry learned defendant was the center of the argument.

The tape itself contains additional indicia Terry heard this information from Ruby or defendant or both. Terry admitted to being "hurt" and "crying" during the drive back to Stockton and discussing with defendant that the police wanted to talk

⁴ Defendant concedes these statements are admissible to impeach Ruby *if* Ruby told Terry based on her own personal knowledge (Evid. Code, § 1235 [prior inconsistent statements]) or if defendant made these statements to Ruby and Ruby, in turn, told Terry (Evid. Code, § 1235 [prior inconsistent statement for Ruby] plus Evid. Code, § 1220 [party admission by defendant].) In addition to these concessions, Terry's audiotape would be admissible to impeach Terry if defendant made these statements directly to him. (Evid. Code, § 1235 [for Terry's inconsistent statement] plus Evid. Code, § 1220 [for defendant's party admission].)

with her. Terry admitted the conversation in the car was emotional and he "d[id]n't want to hear stuff like that." Terry also admitted to talking to defendant about her "defense."

Based on Terry's testimony at trial and the tape, there is sufficient evidence in this record for a reasonable jury to conclude it is more probable than not that Terry heard these facts from Ruby or defendant in the closed-in environment of the car on the way back to Stockton. (*People v. Herrera, supra*, 83 Cal.App.4th at p. 61.) The ultimate decision as to whether he heard this information from Ruby or defendant was for the jury to make. (*Ibid.*)

In fact, the court correctly instructed the jurors they were required to determine whether these foundational facts were true before they could consider this evidence.⁵ The court also

⁵ The court instructed the jury as follows: "Evidence that at some other time a witness made a statement or statements that is or are inconsistent or consistent with his or her testimony in this trial may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on that former occasion. [¶] Any such statement must be based on personal knowledge of the witness. If you find that the witness was guessing about the facts and did not have personal knowledge, then any such statement must be disregarded. [¶] For example, you are the judges as to whether Terry Nieto's use of the word 'guess' refers to a mere rumor or a groundless story he heard from some unidentified person, or whether or not it was based on an actual statement made to him by Ruby Nieto or defendant. [¶] If your interpretation of the testimony is that Ruby Nieto did in fact tell Terry Nieto that defendant told her that she stabbed the victim when he advanced toward her, or that he heard the defendant say that, then you may give the testimony the weight you believe it is entitled to. [¶] If you find that the testimony was nothing more than a guess based upon rumors or

instructed the jurors to disregard this evidence if they found these preliminary facts untrue. The court's determination and instructions were proper. Defendant cannot establish any prejudice from her attorney's failure to review this tape before it was presented to the jury because any objection by defense counsel to this admissible evidence would have been futile.

2. Prosecutorial Misconduct

Defendant also argues the trial court erred in refusing to grant a mistrial after the tape was admitted. Defendant's arguments are twofold on this point. First, defendant argues the prosecutor should not have been able to offer the audiotape of Terry's interview into evidence or argue it in closing argument because the People did not timely turn it over to the defense. Second, defendant claims the prosecutor misrepresented the tape would "clearly demonstrates" Ruby had told Terry defendant had removed the knife from the kitchen and stabbed Marcos. We reject these claims.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible

stories the witness heard from unidentified persons, then you are instructed to totally disregard it."

methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citations.]" (*People v. Hines* (1997) 15 Cal.4th 997, 1038.)

We first turn to the alleged discovery misconduct. Penal Code section 1054.1 provides, in relevant part: "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] . . . [¶] (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

Here, the prosecution was obligated to disclose to defense counsel Terry's tape-recorded statement. The prosecution failed to comply with this statutory discovery obligation by delaying disclosure of the actual tape until trial. The prosecution,

however, provided the defense with a report that disclosed the substance of the tape. The record contains nothing that suggests the People's actions were deliberate or constituted willful misconduct. Further, the record discloses no improper motive by the prosecution or law enforcement on this point.

Guidelines for addressing discovery violations are well established in statutory and case law. A trial court may consider a wide range of sanctions in response to the prosecution's violation of discovery provisions, and the remedy should generally not be broader than is necessary to guarantee a fair trial. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 792; see Pen. Code, § 1054.5, subd. (b).) The most severe penalties for discovery violations, namely, dismissal or precluding the use of evidence, are reserved for the most egregious cases such as those involving a deliberate violation for tactical advantage. (*People v. Edwards* (1993) 17 Cal.App.4th 1248, 1263; see Pen. Code, § 1054.5, subd. (c).)

In many cases, a continuance will give the defendant an opportunity to address the newly disclosed evidence and cure the prejudice caused by the late discovery disclosure. Consequently, a defendant bears the burden of demonstrating the ineffectiveness of such a remedy. (*People v. Pinholster* (1992) 1 Cal.4th 865, 941.) Finally, one of the court's paramount concerns is to determine whether the discovery violations undermined the reliability of the proceedings. (See, e.g., *ibid.*; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1274.) We will reverse the trial court's choice of a discovery sanction

only if we find an abuse of discretion. (See *People v. Jackson* (1993) 15 Cal.App.4th 1197, 1203.)

Because nothing in the record demonstrated the prosecution committed a deliberate violation for a tactical advantage, exclusion of this otherwise admissible evidence was not warranted. The admission of this otherwise admissible tape-recorded statement does not constitute incurable prejudice that required the trial court to declare an immediate mistrial.

To the extent defendant suggests the prosecution misrepresented the contents of the tape, we conclude a rational jury could conclude Ruby or defendant told Terry defendant admitted she grabbed the knife and stabbed Marcos. According to defense counsel, the prosecutor claimed the tape would clearly contradict Terry's statements he did not hear the information from Ruby. While this may have been exaggeration, it did not rise to the level of misconduct. Without any misrepresentation, there is no prosecutorial misconduct.

Defendant argues the prosecutor should not have been able to argue Terry could not have known what happened if defendant or Ruby did not tell him how it happened. This argument falls with defendant's contention this evidence should have been excluded. "At closing argument a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom." (*People v. Morales, supra*, 25 Cal.4th at p. 44.) Here, the prosecutor's arguments were fair arguments to be drawn from the admissible evidence before the jury.

CALJIC No. 3.16

Defendant contends the trial court had a duty to instruct the jury sua sponte with CALJIC No. 3.16 that Chava was an accomplice as a matter of law and that his testimony was subject to the rule requiring corroboration.⁶ We disagree.

Penal Code section 1111 provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

" "[W]henver the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice," the trial court must instruct the jury, sua sponte, to determine whether the witness was an accomplice. [Citation.] If the testimony establishes that the witness was an accomplice as a matter of law, the jury must be so instructed. [Citation.] In either case, the trial court also must instruct the jury, sua

⁶ CALJIC No. 3.16 states: "If the crime of _____ was committed by anyone, the witness _____ was an accomplice as a matter of law and [his] [her] testimony is subject to the rule requiring corroboration."

sponte, '(1) that the testimony of the accomplice witness is to be viewed with distrust [citations], and (2) that the defendant cannot be convicted on the basis of the accomplice's testimony unless it is corroborated' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 982.)

Since an accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given," we must determine whether Chava was liable for prosecution for murder or voluntary manslaughter, the offense here, as a matter of law. (Pen. Code, § 1111; see *People v. Arias* (1996) 13 Cal.4th 92, 142-143.)

To be chargeable with the same crime as the defendant within the meaning of Penal Code section 1111, "it would be necessary for [the person] to be considered a principal under the provisions of [Penal Code] section 31, which includes '[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or not being present, have advised and encouraged its commission. . . .'" (*People v. Hoover* (1974) 12 Cal.3d 875, 879.)

Whether a person is an accomplice within the meaning of Penal Code section 1111 presents a factual question for the jury "unless the evidence permits only a single inference." (*People v. Sully* (1991) 53 Cal.3d 1195, 1227.) A court can decide as a matter of law that a witness is an accomplice only when the facts regarding the witness's criminal culpability

are "clear and undisputed." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 759.)

The People's theory was that defendant, rather than Chava, took the knife and killed Marcos. The defense argued Chava or one of the others -- Jason or Ruby -- was the killer. The evidence of Chava's involvement was equivocal at best.

On the one hand, Chava testified he was across the street when Marcos was killed and could not see the act. Chava testified he did not kill Marcos and did not see anyone kill him. Neither Ruby nor Samuel saw who stabbed Marcos. Jason did not see anyone stab Marcos.

On the other hand, the statement heard by Williams "Java, Java, Java, how could you do that?" implicated Chava. Further, the evidence suggesting Chava and Marcos were fighting about their common love interest suggested a reason Chava might have to stab Marcos. Chava asked the police whether there were fingerprints on the knife when he was arrested. This also suggested Chava was involved. This evidence, however, did not establish, as a matter of law, that Chava was liable as a principal.

Contrasted with the evidence of Chava's involvement, Chava's statements to police pointed the finger at defendant. Chava claimed defendant had the knife, and she buried it the night of the homicide. Chava further told the police defendant admitted killing Marcos.

Marcos was killed by a single knife wound. Only one person could have done it. While one possible interpretation of the

evidence is that Chava killed Marcos, this ultimately remained a question of fact for the jury to resolve, not for the court to direct by giving the accomplice-as-a-matter-of-law instructions. The trial court did not err.

C

Upper Term

Defendant contends "the trial court erred in sentencing [defendant] to the upper term." We disagree.

The People argue defendant waived this claim of error by failing to object below to the court's exercise of its discretion, citing *People v. Scott* (1994) 9 Cal.4th 331, 356. There, the California Supreme Court held challenges to a trial court's discretionary sentencing choices are waived unless they are timely presented when the sentence is pronounced. (*Ibid.*)

Here, defendant submitted a sentencing memorandum challenging the conclusion of the probation report that defendant did not show remorse. Defendant also argued for a sentence of probation or low term at best based on several mitigating factors. Defendant's timely assertion of these arguments preserved them for appeal.

Defendant, however, failed to challenge the use of the following aggravating factors at trial: (a) defendant "'had engaged in violent conduct that indicates a serious danger to society'"; and (b) the use of a "high degree of force" in the wound. Any claims of error based on these aggravating factors are waived. (*People v. Scott, supra*, 9 Cal.4th at p. 356.)

A trial court may impose the upper term only if, after the entire record is considered, circumstances in aggravation, established by a preponderance of the evidence, outweigh circumstances in mitigation. (Cal. Rules of Court, rule 4.420(b)⁷; see also Pen. Code, § 1170, subd. (b).) “Sentencing courts have wide discretion in weighing aggravating and mitigating factors, and may balance them against each other in “qualitative as well as quantitative terms”. . . .” (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582, citations omitted.) Thus, a single factor may suffice to justify the upper term even if two or more mitigating factors are acknowledged. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1758-1759.) We must affirm the trial court’s imposition of the upper term “unless there is a clear showing the sentence choice was arbitrary or irrational.” (*People v. Avalos, supra*, 47 Cal.App.4th at p. 1582.)

Here, the court concluded there were mitigating factors present in this case: defendant had no significant adult record and a minor juvenile record. (Rule 4.423(b)(1).) By implication, the court rejected defendant’s claims this crime was committed under unusual circumstances (Rule 4.423(a)(3)), defendant called 911 to prevent harm to others (Rule 4.423(a)(6)), and defendant suffered a mental condition due to intoxication (Rule 4.423(b)(2)). Balanced against the one

⁷ All further rule references are to the California Rules of Court.

mitigating factor it found present, the court found several aggravating factors. First, this homicide indicated a serious danger to society because it was violent. (Rule 4.421(a)(1).) Second, defendant was on probation at the time she killed Marcos. (Rule 4.421(b)(4).) Third, the court concluded the crime involved a high degree of callousness. (Rule 4.421(a)(1).) In all, the court found the aggravating factors outweighed the mitigating factors and imposed the upper term.

Considering all of the circumstances, we cannot say the trial court acted arbitrarily, capriciously, or beyond the bounds of reasons in imposing the upper term. (*People v. Welch* (1993) 5 Cal.4th 228, 234.) The facts before the court supported each of the findings of aggravating circumstances. Defendant killed her former boyfriend by stabbing him in the side with a kitchen knife. The court found the stabbing took a great deal of force because the blade had to penetrate an inch deeper than it was long. It was undisputed defendant was on probation at the time of the homicide. Both the trial court and the probation officer observed defendant showed no sorrow or emotion regarding Marcos's death. It was apparent the trial court was cognizant of all the facts and circumstances of the case and the arguments of counsel. The court made a careful, reasoned decision on the record as to its sentencing choice.

Defendant attempts to reargue the factual finding that defendant's reaction to this crime disclosed she was callous by pointing to the evidence that defendant claimed to be sorry about the homicide. We did not spend the time in trial with

defendant, hear the evidence, or see her reaction or lack of reaction to the evidence. In addition to the trial court's observations, the probation report provided more evidence to support this conclusion. The court did not abuse its discretion.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SCOTLAND, P.J.

RAYE, J.